Supreme Court, U.S.
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80-518

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC.

and

INSURANCE COMPANY OF NORTH AMERICA

Petitioners

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

RALPH RILEY

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether there is any statutory requirement under the Longshoremen's and Harbor Workers' Compensation Act for a claimant to prove the occurrence of an "accidental injury arising out of and in the course of employment" (33 U.S.C. 902(2)).

2. Whether the statutory presumption under 33 U.S.C. 920(a) can properly be applied in the claimant's favor, when there was substantial evidence of record before the Court below to rebut the statutory presumption, and affirm the findings of the Administrative Law Judge and Benefits Review Board.

PARTIES BELOW

In the Court below, the Petitioners were Respondents. The Respondent Ralph Riley was Petitioner in the Court below and Respondent Director, Office of Workers' Compensation Program, U.S. Department of Labor, was Intervenor in the Court below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Federal Sheet Metal/U.S. Industries and Insurance Company of North America respectively pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS AND JUDGMENT BELOW

The opinion of the Court of Appeals, not yet officially reported, denying the Petition for Rehearing, dated July 3, 1980, is set forth as Appendix A hereto. The opinion of the Court of Appeals denying Suggestion for Rehearing En Banc dated July 3, 1980, not yet officially reported is set forth as Appendix B hereto. The Court of Appeals decision is unreported and is attached hereto as Appendix C. The unreported decision of the Benefits Review Board is set forth as Appendix D hereto. The unreported decision of the Administrative Law Judge is attached hereto as Appendix E.

JURISDICTION

The decision of the Court of Appeals was entered on May 22, 1980. The order of the Court of Appeals denying the Petitions for Rehearing and for Suggesting Rehearing En Banc was entered on July 3, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

District of Columbia Code:

§ 36-501. Longshoremen's and Harbor Workers' Compensation Act made applicable to the District of Columbia.

> The provisions of chapter 18 of Title 33 U.S.Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every per-

son carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

United States Code, Title 33:

§ 902. *Definitions*

When used in this chapter—

* * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

§ 903. *Coverage*

(a) Compensation shall be payable under this Chapter in respect of disability or death of an employee, but only if the disability or death results from an injury. . . .

§ 920. *Presumption*

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

March 4, 1927, c.509, § 20, 44 Stat. 1436.

STATEMENT OF THE CASE

On November 20, 1975, the Respondent Ralph Riley, awoke at home about 2:30 a.m. feeling sweaty, tight in his chest and with pain in both arms. He was taken by his wife to LaPlata Hospital, about thirteen miles away, where he was admitted until November 25, 1975. No history of injury on the job was given by wife or husband to the hospital or to any of the physicians who treated him in the hospital, including Dr. Henry Burke or Dr. Alvaro Sanchez, an orthopedic who treated him during his hospital stay. Initially he had been admitted to the Coronary Care Unit of the hospital to rule out myocardial infarction, but by the time of discharge the diagnosis was cervical arthritis, and he was referred for further care to his private physician, Dr. Herbert Wisotsky. Dr. Wisotsky had been treating Ralph Riley for arthritis since 1970. He had hospitalized Riley at Cafritz Hospital, Washington, D.C., in 1970 where X-rays had confirmed arthritic changes. Since May, 1975, Mr. Riley had been again under Dr. Wisotsky's active care for arthritis when he had been "off work" because of neck, shoulder and arm pains. Prior to November, 1975, Dr. Wisotsky had discussed retirement with Riley because of his cervical arthritis and prescribed medication to him for treatment of the arthritis. Dr. Wisotsky did not see Mr. Riley in the hospital in November but saw him December 1, 1975 for "anxiety".

There was no mention at all to Dr. Wisotsky on that first visit since July, of the injury on the job causing the November hospitalization. Dr. Wisotsky saw him again on December 5 and referred him to Dr. Scalettar and Dr. Maguigad, other consultants who also examined him in December. There was no mention by Mr. Riley to these physicians who examined him at that time (and their reports are in evidence) of any on-the-job occurrence or incident of increased arthritic pain.

On December 19, 1975, Mr. Riley saw Dr. Sanchez, who had previously examined him at LaPlata Hospital during his November admission there. On that date, Respondent Riley told Dr. Sanchez that he had "strained" his neck when moving duct work at Walter Reed Hospital on November 19, 1975. On December 29, 1975, the Respondent Riley retained counsel who filed a claim for Workers' Compensation with the U.S. Department of Labor under the D.C. Workers' Compensation Act, 36 D.C. Code § 501. On this claim form he alleged that an "accident" occurred when he was "lifting duct work weighing approximately 500 pounds and felt a sharp pain in my neck". On July 16, 1976 he also filled out a claim form for the Respondent U.S. Industries/Federal Sheet Metal and their Insurer Respondent Insurance Company of North America asserting he had "struck his neck and shoulders on duct work".

Prior to November 20, 1975, Mr. Riley had been employed by the Respondent U.S. Industries/Federal Sheet Metal at Walter Reed Hospital for approximately three weeks. He had been working there with his friend of fourteen years, Harold Sutherland, with whom he regularly commuted to and from work. Prior to the employment with Federal Sheet Metal, both men

had been off work and on unemployment compensation for six months, after working three and a half years for Chalk Point Power Plant in Maryland. Mr. Sutherland testified he first learned of Mr. Riley's hospital admission from Mrs. Riley who called him at 5:30 to 6:00 o'clock in the morning on November 20, advising him of Mr. Riley's hospitalization. Mr. Sutherland testified he went to the job site that day and again three to four days later and reported that Mr. Riley had been "hurt". The employer received no report of job-related injury to Riley from its foremen but was aware that Riley had been placed into the hospital for a "heart attack". The foreman who was told by Sutherland that Riley was in the hospital, was told three to four days after by Sutherland, that he had suffered a heart attack and was in intensive care.

The case was tried before an Administrative Law Judge who found as a fact that Mr. Riley had failed to prove an accidental injury under 33 U.S.C. § 902(2) and that he and Sutherland had given false testimony concerning the hoppening of the "accident". (see Appendix E.) This decision of the Administrative Law Judge was affirmed by the Benefits Review Board with a dissent. (See Appendix D.) The Respondent Riley petitioned for review pursuant to 33 U.S.C. § 921(c) to the United States Court of Appeals for the District of Columbia. On appeal the Director, Office of Workers' Compensation Programs intervened and adopted the dissent of Judge Miller of the Benefits Board. The Court of Appeals reversed the Benefits Review Board, asserting that under 33 U.S.C. § 920(a) there is a presumption that an "accidental injury" had occurred, and the Administrative Law Judge's decision was contrary to law because he failed to consider 33 U.S.C.

§ 920(a). (See Appendix C.) The Court held that because the Respondent Riley awakened in pain on November 20, 1975, that he suffered an "injury" and that by requiring the claimant to prove an accident did in fact occur, the Administrative Law Judge denied the claimant benefit of that presumption. The Court found that the Administrative Law Judge and Benefits Review Board had relied upon a "narrower statutory presumption" than required by the statute and, while vacating the decision of the Benefits Review Board and remanding "for full consideration of Petitioner's claim in light of this opinion" made no comment or finding concerning whether the evidence produced in the case was substantial evidence to rebut the presumption which the Court found should have been applied.

REASONS FOR GRANTING THE WRIT

I

The Decision of the District of Columbia Circuit Below is in Direct Conflict with the Rule of Law Followed in the Seventh, Fifth, Fourth and Second Circuits.

The lower Court in reversing the Administrative Law Judge and Benefits Review Board, found that 33 U.S.C. § 920(a) applied to determinations of whether the Respondent Riley had to prove an "accidental injury arising out of the course of employment", 33 U.S.C. § 902(2). (App. 10a.) Such finding is in direct conflict with decisions on the same issue in the Seventh, Fifth, Fourth and Second Circuits.

Initially it should be noted that the Respondent Riley's claim alleged that he suffered trauma striking his neck on duct work, or lifting heavy duct work which caused neck strain and thus disability from work. The Administrative Law Judge and the Benefits

Review Board both concluded in reviewing the evidence that no "accident" occurred, contrary to Respondent Riley's contentions that he injured himself at work on November 19, 1975. This Court has previously observed that the purpose of this legislation is to provide payment to employees who suffer loss as a result of personal injuries or death occurring *in the course of* their employment. *Baltimore and Philadelphia Steamboat Company* v. *Norton,* 284 U.S. 408-415. When the Respondent Riley was taken to the hospital at 2:30 a.m., he was not *in the course of employment.* His employment had terminated with the end of his workday in late afternoon of the day before. The Court of Appeals for the District of Columbia Circuit, however, found that Riley suffered "injury" when he awakened in pain in the early morning hours of November 20, 1975. This finding ignores the fact that Riley was "off work" because of arthritic pain in May, June and July, 1975, had been advised by his physician to retire from work, and had worked for this employer for three weeks with arthritic medication in his tool box. Once having found that Riley suffered "injury", the Court below found that "he was entitled to the benefit of the statutory presumption that his claim was compensable". (33 U.S.C. § 920(a).) (App. 10a.)

However, this finding of the lower Court ignores the question of whether or not the facts surrounding this "injury" were sufficient to bring the case within the statute; in other words, whether the disability was an "injury arising out of" Riley's employment. In *Ayers* v. *Hoage,* 63 F. 2d 364, 365, the D.C. Circuit defined an injury "arising out of" employment as follows:

> "An injury 'arises out of' the employment within the meaning of the Compensation Act when it oc-

curs in or incidental to the employment or to the conditions under which it is required to be performed. The mere fact that the injury is contemporaneous or coincident with the employment is not a sufficient basis for an award. *Indemnity Insurance Company of North America* v. *Hoage,* 61 App. D.C. 173, 58 F. 2d 1074, 60 Wash. Law Rep. 450; *Madore* v. *New Departure Manufacturing Co.,* 104 Conn. 709, 134 A. 259-261. In the Madore case the Court said: 'Before he can make a valid award, the trier must determine that there is a direct casual connection between the injury, whether it be the result of accident or disease and the employment. The question he must answer is: was the employment a proximate cause of the disablement, or was the injured condition merely contemporaneous or coincident with the employment; if it was the latter, there can be no award made'." See also *Groom* v. *Cardillo,* 119 F. 2d 697, 699 (D.C. Cir. 1941).

This case law placed the burden upon the injured party to prove his injury by showing that it arose out of employment activity or specific trauma on the job. This has remained the law and interpretation of the Longshoremen's and Harbor Workers' Act until the present time in the Seventh, Fifth, Fourth and Second Circuits. In the Seventh Circuit in the case of *Eschbach* v. *Contractors Pacific Naval Air Bases,* 181 F. 2d 860 (7th Cir. 1950), the employee contended that his tuberculosis condition resulted from or was caused by his employment. In discussing the § 20(a) presumption, the Seventh Circuit stated:

> The fact as to casual connection between the employment and the injury is not one which is to be so presumed. In the hearing before the Deputy Commissioner, the burden was on the Plaintiff to prove such fact." (181 F. 2d 864.)

In that case the claimant had contended that the burden was on the employer-insurance carrier to show that the plaintiff's condition did not arise from his employment, or was not aggravated by his employment. These contentions were rejected by the Court and the Deputy Commissioner's denial of the claim was reinstated by the Court.

In the Fifth Circuit case of *Young & Company* v. *Shea,* 397 F. 2d 185 (5th Cir. 1968), the Court stated as follows:

> "What the jury concluded was that there was no injury, or, as we said when the case was appealed, 'that the accident did not occur'." *Tugwell* v. *A. S. Klaveness & Co.,* 5th Cir. 1963, 320 F. 2d 866, 868 . . . Under 33 U.S.C. § 920(a), the claimant has the burden of proving all that is not presumed under § 920. See *Eschbach* v. *Contractors Pacific Naval Air Bases,* 7th Cir. 1950, 181 F. 2d 860. § 920 does not presume an injury so the claimant must prove its existence, *Sykes* v. *O'Hearne,* D. Md. 1960, 181 F. Supp. 368, 371.

In the Fourth Circuit case of *Furlong* v. *O'Hearne,* 144 F. Supp. 266 (D. Md. 1956), affirmed *O'Hearne* v. *Furlong,* 240 F. 2d 958 (4th Cir. 1957), the Court stated at page 271 as follows:

> "The presumption in § 920(a) does not relieve the claimant of the necessity of proving injury. *Eschbach* v. *Contractors Pacific Naval Air Bases,* 7th Cir. 181 F.2d 860, 864; *Larson,* Op. Cit. § 1033, § 80.33, see also *Del Vecchio* v. *Bowers,* 296 U.S. 280, 286, 56 S. Ct. 190, 80 L. Ed. 229."

In the Second Circuit in the case of *Gooding* v. *Willard,* 209 F.2d 813 (2d Cir. 1954), the Court in discus-

sing the claim for heart problems after a worker had fallen and struck his chest against a metal lunch box he was carrying, stated as follows in affirming the rejection of the claim by the Deputy Commissioner:

> "We might let the decision be determined on the above, but it should also be noted that the burden to show that the accident was a contributing cause of the death was on the appellee."

Despite the above cited opinions from other circuits, the District of Columbia Circuit has continued to provide their own interpretation of what is to be proven under the Act and how the statutory presumption should apply to cases construing the Act. Although the Administrative Law Judge found in his decision "that the claimant sustained no injury within the meaning of § 2(2) of the Act on November 19, 1975 as alleged", (App. 24a) the lower Court found that an "injury" had occurred to Riley and that the presumption under § 20 should have been applied by the Judge and the Benefits Review Board to the claimant's injury so that he receive the benefit of the rebuttable presumption that the injury arose out of and in the course of claimant's employment. More specifically, the holding is stated as follows:

> "We now hold expressly that where a claimant has been injured, the Act requires that, in the absence of substantial evidence to the contrary, a claimant be given the benefit of a rebuttable presumption that the injury arose out of and in the course of the claimant's employment. . . .
>
> * * * *
>
> "There is no question in this case that the claimant suffered an injury; therefore he was entitled to the benefit of the statutory presumption that his

> claim was compensable. By focusing on the "accident", which allegedly occurred on November 19, 1975, and by requiring the claimant to prove that the accident did in fact occur, the Administrative Law Judge denied the claimant the benefit of this presumption. The central finding, that no accident in fact occurred, is thus not responsive to the issue properly presented for resolution. The statutory presumption is not limited to the inference of a work-related incident from an injury, and neither is the scope of the employer's burden of coming forward with substantial evidence in rebuttal." (App. 10a.)

Thus, the lower Court in this case has effectively changed the law which has applied to the interpretation of cases under this Act since the *Eschbach* decision, by the present decision in *Riley*. The lower Court's decision has effectively wiped-out the long-standing requirement that the plaintiff prove facts to sustain his injury, and prove casual connection between the employment and the injury. Under this opinion, it is not necessary to prove an "injury arising out of and in the course of employment" had occurred to Mr. Riley. It should be noted that the statutory presumption which has been relied on, does not, by its terms, state that it is a presumption of injury, or a presumption of casual relationship between the injury and employment, but only "that the claim comes within the provisions of this Act". The history of this presumption interpreted by the Supreme Court begins with *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947). In that decision this Court stated that:

> "We are aided here, of course, by the provision of § 20 of the Longshoremen's Act, that in proceedings under that Act, jurisdiction is to be 'pre-

> sumed in the absence of substantial evidence to the contrary', a provision which applies with equal force to proceedings under the District of Columbia Act."

The Supreme Court next considered accidental injury arising out of employment under the Longshoremen's Act in 1951 in the case of *O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 509, 95 L. Ed. 487. In that case there was no mention of the § 20(a) presumption at all, in a case dealing with whether or not the death claim arose out of and in the course of the decedent's employment. It was specifically mentioned in *O'Keefe* v. *Smith, Hinchman and Grylls Associates* at 380 U.S. 359, 85 S. Ct. 1012, 13 L. Ed. 2d 895 (1965). However, no discussion was undertaken by the Court as to how the presumption affected the facts at issue, except in the dissent. In this opinion the Supreme Court had reversed the Court of Appeals who had reversed a Deputy Commissioner's finding that the accident arose out of and in the course of the claimant's employment. There was no discussion as to how the presumption applied or whether it was to apply to "accident" or "injury" or "arising out of". In fact, it was the dissent which discussed this issue in some detail, as follows:

> "To permit the award of compensation to stand reads the "job-connected emphasis right out of the statute, an emphasis which is clearly there. Only injuries arising out of the employment are compensated. A disease or infection is covered if it arises "naturally out of such employment" .... A 'but for' relationship between the injury and the employment should not in itself be sufficient to bring about coverage."

It is the above dissent which has now come to fruition in the D.C. Circuit with the present case involving Ralph Riley. The holding of the lower Court extends the scope of this "workers' compensation" statute to make it general health insurance covering anything that goes wrong in the human frame. Under this decision any condition or ailment of ordinary life, is presumed to be related to a worker's employment, unless the employer can present substantial evidence to the contrary to rebut this presumption.[1] In order to avoid this unsupportable extention of the statute, it is necessary that the Supreme Court grant this writ to affirm that coverage under this Act must be limited to trauma or diseases resulting from working conditions peculiar to the calling, and that employers be not presumed to be held responsible for daily hazards involved in ordinary living. See *Grain Handling Co.* v. *Sweeney,* 102 F. 2d 464, 465 (2d Cir. 1939).

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[1] The holding of this Circuit in *Swinton* v. *J. Frank Kelly,* 554 F. 2d 1075 (D.C. Cir. 1976), *cert. den.* 429 U.S. 820, 97 S. Ct. 67, 50 L. Ed. 2d 81, is factually and legally distinguishable from the present case. In *Swinton* v. *J. Frank Kelly,* 554 F. 2d 1075, *cert. den.* 429 U.S. 820, 50 L. Ed. 2d 81 (1976) there was "no dispute as to the occurrence of the accident or the fact that any injuries associated with it arose out of and in the course of Swinton's employment. The focal issue was the extent of Swinton's injuries; specifically whether his back problem was causally related to the mishap on the truck". 554 F. 2d p. 1082.

II

The District of Columbia Circuit Has Decided an Important Federal Question Which Has Not Been, But Should Be, Settled by This Court.

Clearly, this case is of importance to the administration of the many thousands of claims under the Longshoremen's and Harbor Workers' Act (33 U.S.C. 901 *et seq.*) and its Extensions which include the Defense Base Act (42 U.S.C. § 1651-1654 (1976)), and Non-Appropriated Fund Instrumentalities Act (5 U.S.C. § 8171-8173 (1976)), the Outer Continental Shelf Lands Act (43 U.S.C. § 1331-1343 (1976 & Supp. 1 1977)), and to all non-governmental employees under the District of Columbia Workers' Compensation Act (36 D.C. Code 501, *et seq.*). If this interpretation of the definition of "injury" under this Act and the application of the § 20(a) presumption to it is allowed to stand, the District of Columbia Circuit Court opinion will affect every claim coming under the aforementioned Federal Acts. In order for there to be a claim under these Acts, there must be "injury arising out of and in the course of employment". The decision of the lower Court affects that definition and burden of proof, and the Court's interpretation will bring workers' compensation into every non-occupational injury, disease or condition suffered by an employee subject to the jurisdiction of the aforementioned Federal Acts. If allowed to stand, the District of Columbia Circuit's opinion will undoubtedly burden the administrative bodies and the courts with much additional litigation over the casual relationship to employment of such heretofor common events of ordinary life such as colds, virus, heart attack, cancer, pneumonia, and death from

related conditions of old age. Under the lower Court's decision there is no longer any "nexus" required between employment and injury in order for an employee to seek workers' compensation benefits under this statute. An employee may be in perfect health at quitting time from his usual employment, and the next day if "something goes wrong within the human frame", this decision holds that the employee has suffered "injury" and, accordingly, can claim workers' compensation benefits for any ailment which he has. The employee is not required to put on *any* proof whatsoever or show that he had suffered an "accidental injury or death arising out of and in the course of his employment". (33 U.S.C. 902(2).) The lower Court's decision has suggested a new method for resolving workers' compensation cases under the aforementioned Federal Acts: the employee files his claim, then the employer puts on evidence to try to rebut the § 20 presumption of "accidental injury" or casualty, and then if there is "substantial evidence to the contrary", *Del Vecchio* v. *Bowers,* 296 U.S. 280, 56 S. Ct. 193, 80 L. Ed. 229 (1935), the employee will present his evidence to rebut the employer's evidence. However, the employee and employer know that in the compensation proceeding any doubt is to be resolved in favor of the employee, and the Act as "remedial legislation" is to be liberally construed in his favor. *Wheatley* v. *Adler,* 407 F. 2d 307, 313 (D.C. Cir. 1968).

The important federal question raised herein should be resolved by the Court.

III

To Insure the Proper Scope of Judicial Review in Accordance With Established Supreme Court Precedent.

This Court has held on numerous occasions, under the Longshoremen's and Harbor Workers' Compensation Act, that where the evidence before the Deputy Commissioner (Administrative Law Judge) permits the drawing of diverse inferences, his determinations of fact are to be accepted unless they are unsupported by substantial evidence in the record considered as a whole. *O'Keefe* v. *Smith Associates, supra; O'Leary* v. *Brown-Pacific-Maxon, Inc., supra.* Moreover, that the facts permit diverse inferences is immaterial; if supported by the evidence, the inferences drawn by the Administrative Law Judge are conclusive. *O'Keefe* v. *Smith Associates, Inc., supra; Presley* v. *Tinsley Maintenance Service,* 529 F. 2d 433, 436 (5th Cir. 1976). When a decision of the Benefits Review Board is before the Court of Appeals, review is limited to areas of law, including the question of whether the Board adhered to the substantial evidence standard in its review of factual findings. *Presley* v. *Tinsley Maintenance Service, supra; Potenza* v. *United Terminals, Inc.,* 524 F. 2d 1136, 1137 (2d Cir. 1975). And even when the issue involves the "application of a broad statutory term or phrase to a specific set of facts," the Board's decision will be affirmed so long as it has a "reasonable legal basis". *Cardillo* v. *Liberty Mutual Insurance Co., supra.*

In *Riley,* the Administrative Law Judge stated that he did construe the evidence in a light most favorable to the claimant, and with all doubts resolved in favor of the injured employee. *Young and Co.* v. *Shea,* 397

F. 2d 185, 188 (5th Cir. 1968) *cert. den.* 395 U.S. 920, 89 S. Ct. 1771, 23 L. Ed. 2d 237 (1969). But the Administrative Law Judge also found on the evidence "that the claimant sustained no injury within the meaning of § 2(2) of the Act on November 19, 1975, as alleged, and that claimant and [his friend] gave false testimony as to the happening of an accident". (App. 24a.) In reviewing these findings, the lower Court cited the standard that "an administrative order must be set aside if it rests on factual premises not based on substantial record evidence, or if the Agency's underlying standards are not in accord with law". *Wheatley* v. *Adler*, 407 F. 2d at 310. The Court found as follows:

> "We are stymied in the application of this standard from the start. Because the Administrative Law Judge and the Benefits Review Board relied upon a statutory presumption narrower than that elaborated here, the Agency did not make all of the findings necessary for a proper disposition of Petitioner's claim. We cannot anticipate what these findings will be. See *Vendemia* v. *Cristaldi*, 221 F. 2d 103, 106 (D.C. Cir. 1955)." (App. 10a-11a.)

Even though the lower Court found that the decision of the Benefits Review Board was erroneous, it is asserted that this Court should do as it did in *Del Vecchio* v. *Bowers, supra.*, and reverse the Circuit Court of Appeals and reinstate the decision of the Benefits Review Board. It appears from the lower Court's decision that they now desire a determination whether the injuries suffered by the claimant might have been "employment-bred". It should not be the function of this Court or the lower Court to engage upon review in speculation as to what facts might further be presented to enable the Respondent Riley to recover com-

pensation. The reviewing Court may not reweigh the evidence and questions of credibility are for the Administrative Law Judge. *South Chicago Coal & Dock Co.* v. *Basset,* 104 F. 2d 522 (7th Cir. 1939) aff'd. 309 U.S. 251 (1940); *John W. McGrath* v. *Hughes,* 289 F. 2d. 403 (2d Cir. 1961); *Calbeck* v. *Strachan Shipping Co.,* 306 F. 2d 693 (5th Cir. 1962) *cert. den.* 372 U.S. 954 (1963); *Cordero* v. *Triple A Machine Shop,* 580 F. 2d 1331 (9th Cir. 1978). In fact, the Judge found:

> "That claimant and Sutherland gave false testimony as to the happening of an accident.
>
> "The record, in my judgment, is free of doubt and permits of no other findings as to the credibility of claimant and Sutherland." (App. 24a.)

Here in this record, the Petitioners have provided sufficient proof to rebut the presumption, if it applies to the case. *Travelers Insurance Co.* v. *Belair,* 412 F. 2d 297, 301 n.6 (1st Cir. 1969); *John W. McGrath Corporation* v. *Hughes, supra.* This Court has noted that the presumption serves only to control the result where there is a total lack of competent evidence. *Del Vecchio* v. *Bowers, supra.* It is contended that the presumption is without effect where, as here, the totality of evidence places the Respondent's claim outside of the recognized coverage of the Longshoremen's Act.

The lower Court citing *Vozzolo, Inc.* v. *Britton,* 377 F. 2d at 147-148, stated: "employers accept with their employees the frailties that predispose them to bodily hurt". (App. 7a.) After reviewing cases under the D.C. Act, the lower Court in *Riley* opined that its cited cases "make clear the pervasive scope of the statutory presumption of compensability". It is submitted, however, that the lower Court reweighed the evidence presented

before the Administrative Law Judge and substituted its own judgment for the decision which it felt that he should have arrived at. The Court stated that "Even if the asserted work-related incident had never occurred, the injuries suffered by the claimant might nevertheless have been employment-bred. As a consequence, for purposes of this proceeding, Petitioner was entitled to the presumption that they were". This result is completely contrary to the Supreme Court's standard of review as referenced above. To borrow from Judge Tamm's dissent in *Wheatley* v. *Adler,* 407 W. 2d 307, 318 (D.C. Cir. 1968):

> "My deep concern about the majority opinion is that in an effort to achieve a humanitarian result my learned and well intentioned brethren are ignoring all established precedents and virtually placing this type of case on a basis of compassion. I readily recognize the liberal philosophy of the courts in construing workmen's compensation laws but I cannot subscribe to a doctrine of superior credibility of claimant's witnesses or of inherent suspicion toward those wtinesses, lay and professional, who testify adversely to the claim. . . . As too frequently happens in this court, the majority completely ignores the superior opportunity which the trier of facts, in this case the Deputy Commissioner [now Administrative Law Judge], had to observe the witnesses in person, evaluate their manner of testifying and compare their relative characteristics before arriving at a determination of their credibility.
>
> * * * *
>
> "We cannot substitute our judgment for the Deputy's [Administrative Law Judge's] judgment, nor can we weigh the evidence. *Groom* v. *Cardillo,* 73 App. D.C. 358, 359, 119 F. 2d 697, 698 (1941). The series of cases in this field that will result

> from today's opinion, will produce a brouhaha lacking foundation and logic, organization in reason and justification on any legal basis. The resulting paraselenae will negate the realism of proceeding before the Deputy Commissioner [Administrative Law Judge] and dissolve the significance of any bona fide defense to a workmen's compensation claim."

The question now comes to this Court for its answer.

CONCLUSION

For all of the reasons set forth above herein, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 79-1417

RALPH RILEY,
Claimant/Petitioner

v.

U.S. INDUSTRIES/FEDERAL SHEET METAL,
Employer/Respondent

and

INSURANCE COMPANY OF NORTH AMERICA,
Carrier/Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Intervenor

Filed July 3, 1980

BEFORE: Wilkey, Wald, and Edwards; Circuit Judges

ORDER

Upon consideration of respondents' petition for rehearing, it is

ORDERED, by the Court, that respondents' aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:

/s/ GEORGE A. FISHER
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 79-1417

RALPH RILEY,
Claimant/Petitioner

v.

U.S. INDUSTRIES/FEDERAL SHEET METAL,
Employer/Respondent

and

INSURANCE COMPANY OF NORTH AMERICA,
Carrier/Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Intervenor

Filed July 3, 1980

BEFORE: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, and Edwards, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by respondents' having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, *en banc*, that respondents' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:

/s/ GEORGE A. FISHER
Clerk

Circuit Judges Tamm, MacKinnon, and Robb would grant respondents' suggestion for rehearing *en banc*.

APPENDIX C

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1417

RALPH RILEY, *Petitioner*

v.

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC.

and

INSURANCE COMPANY OF NORTH AMERICA, *Respondents*

Petition for Review of a Decision
and Order of the Benefits Review Board,
United States Department of Labor

Argued April 25, 1980

Decided May 22, 1980

Judgment entered this date

James F. Green with whom *Joseph H. Koonz, Jr.* and *James A. Mannino* were on the brief for petitioner.

Richard W. Galiher, Jr. for respondents.

Gilbert T. Renaut was on the brief for the Director, Office of Workers' Compensation Programs, United States Department of Labor, Intervenor, urging reversal.

Bill of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before WILKEY, WALD and EDWARDS, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: This appeal from a decision of the Benefits Review Board raises questions concerning the scope of the statutory presumption of compensability contained in the Longshoremen's and Harbor Workers' Compensation Act (the "Act").[1] At the initial hearing in this case before the administrative law judge ("ALJ"), petitioner's claim for compensation was denied. The decision of the ALJ was subsequently affirmed by the Benefits Review Board, with one member dissenting. Since we find that the decisions rendered at the administrative level misapplied the statutory presumption in considering petitioner's claim, we reverse and remand for reconsideration in light of the standards set forth in this opinion.

I.

The petitioner, who is fifty-four years old, has been a sheet metal worker for approximately thirty-two years. Beginning in 1970, the petitioner has suffered recurring neck ailments which have been diagnosed as arthritic in origin. The incident giving rise to the instant claim allegedly occurred on November 19, 1975, when the petitioner was installing duct work into a ceiling at Walter Reed Hospital. At the hearing before the ALJ, petitioner repre-

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[1] Act of March 4, 1927, ch. 509, 44 Stat. 1124, as amended, 33 U.S.C. § 901 *et seq.* (1967), made applicable to the District of Columbia, with exceptions not relevant here, by the Act of May 17, 1928, ch. 612 §§ 1, 2, 45 Stat. 600, as amended, D.C. Code §§ 36-501, 36-502 (1973). *See Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 67 S.Ct. 801, 91 L.Ed. 1028 (1947). The statutory presumption of compensability is found in Section 20 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 920 (1976).

sented that he struck his neck and shoulders on overhead duct work late in the afternoon as he was hoisting himself from the lower to the upper level of a scaffold. Petitioner's story was corroborated by the testimony of a co-worker who was on the job with petitioner on the day in question and with whom petitioner had maintained a friendship for fourteen years. There were no other witnesses to the alleged incident.

In the early morning after the occasion of the alleged accident, the petitioner awoke with severe pains in his neck, shoulders and arms, and was taken to the hospital. A heart attack was originally suspected, but doctors subsequently concluded that the petitioner's discomfort was due to an exacerbation of his arthritic condition. The record reveals some dispute as to whether the petitioner told his attending physicians about the accident which allegedly occurred while he was at work on November 19, 1975. There is also a dispute as to whether petitioner's friend and co-worker, who was the sole witness to the alleged accident, reported the incident to his superiors the next day.

The claimant filed a claim for permanent total disability under the Act on December 29, 1975. Following a two-day hearing and the submission of post-hearing depositions, the ALJ denied petitioner's claim in a decision dated June 22, 1978. The ALJ found "that Claimant sustained no injury within the meaning of Sec. 2(2) of the Act on November 19, 1975, as alleged, and that Claimant and [his friend] gave false testimony as to the happening of an accident." App. 93. In reaching these conclusions, the ALJ observed that:

> In evaluating evidence on the issue of "injury", it is clear that while the Section 20 presemption [sic] is inapplicable to the happening of an accident and while the burden rests with the Claimant to prove an accident, *Murphy v. SCA/Shayne Bros.*, 7 BRBS 309 (1977), the evidence must nevertheless be construed

> in a light most favorable to Claimant and all doubts must be resolved in Claimant's favor.

App. 93.

In upholding the decision of the ALJ, a majority of the Benefits Review Board concluded that:

> * * * the administrative law judge's summary and analysis of the evidence are both supported by the record and consistent with the applicable law. There can be no question that the inferences drawn by the administrative law judge, *which led him to conclude that no accident occurred,* are reasonable and that the administrative law judge's conclusion on this point must be affirmed. (emphasis added)

App. 101.

The dissenting member of the Benefits Review Board urged that the decision of the ALJ should have been reversed because "the real issue in this case is not whether claimant sustained an accident at work but whether claimant's injury is causally related to his employment." App. 103. Both petitioner and intervenor (the Director of the Office of Worker's Compensation Programs, United States Department of Labor), have embraced the opinion of the dissenting member of the Benefits Review Board. Petitioner, in particular, argues that both the ALJ and the majority opinion of the Benefits Review Board, in focusing on the alleged "accident" of November 19, 1975, improperly denied claimant the benefit of a statutory presumption with respect to the issue of causation. Petitioner maintains, in other words, that he was denied the presumption that his *injury* "arose out of and in the course of" his employment, as the statute requires. We agree.

II.

The statutory presumption of compensability, which appears at section 20(a) of the Act, 33 U.S.C. § 920(a), reads as follows:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed in the absence of substantial evidence to the contrary—
>
> (a) that the claim comes within the provisions of this Act.

Two other statutory provisions define and limit the scope of liability under the Act. Pursuant to 33 U.S.C. § 903, compensation shall be payable in respect of disability resulting from an "injury" covered by the Act.[2] "Injury" is defined to include, in part, "accidental injury or death arising out of and in the course of employment." 33 U.S.C. § 902(2). Judicial scrutiny of the Act has concerned itself primarily with the nature of a compensable injury and with the requirement that such an injury be "employment-bred" —that is, arising out of and in the course of employment. See *J. V. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 149 (D.C. Cir. 1967).

III.

On the record in this case, it can hardly be disputed that petitioner suffered an "injury" when he awakened in pain on November 20, 1975. Prior decisions in this Circuit make it plain that the pre-existence of petitioner's arthritic neck condition could not, without more, be deemed to be a determinative factor in this case. As was noted in *J. V. Vozzolo, Inc. v. Britton*, 377 F.2d at 147-48, "employers accept with their employees the frailties that predispose them to bodily hurt."

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[2] Other limitations on compensability contained in section 903 are not relevant here.

It is likewise clear that an "injury" need not be an external one in order to be covered by the Act. It is enough if "something unexpectedly goes wrong with the human frame." *See Wheatley v. Alder*, 407 F.2d 307, 313 (D.C. Cir. 1968) (*en banc*). The hospitalization of petitioner, during the early morning hours of November 20, 1975, is not questioned. Furthermore, both the preliminary diagnosis of a heart attack and the subsequent finding that the pain suffered by petitioner was due to an exacerbation of his arthritic neck condition indicate that the claimant's condition had taken a "sudden turn for the worse." *Id.* at 312. In the light of this evidence, which is undisputed, there can be no question but that petitioner suffered an "injury" as that term has been heretofore construed under the Act.

IV.

Since the record here reveals that petitioner did, indeed, suffer an "injury," we must now turn our attention to the statutory presumption and the range of situations to which this Court has applied it. In cases where there has been no question with respect to the existence of an injury "in the course of" employment the Act has been consistently interpreted to require that the injury be presumed to have arisen "out of" employment as well. *Mitchell v. Woodworth*, 449 F.2d 1097 (D.C. Cir. 1971); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (*en banc*). "[T]he occurrence of an injury in the course of employment strengthens the presumption that it arises out of the employment, . . ." *Vendemia v. Cristaldi*, 221 F.2d 103, 105 (D.C. Cir. 1955), *quoted with approval* in *Wheatley v. Adler*, 407 F.2d at 312.

This Court has also consistently held that an injury need not have occurred during working hours in order to be compensable. In *Swinton v. Kelly*, 554 F.2d 1075 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976), the injury for

which compensation was sought was a back ailment that became manifest almost a year after the claimant's work-related fall from a truck. The Court noted that "[t]he statutory presumption applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of the claim." *Id.* at 1082 (footnote omitted). An even more striking example is found in *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967), where a heart attack was held to be compensable although it was claimed to have stemmed from an employment-related incident occurring five years before. The Court applied the statutory presumption as follows:

> Moreover, the Act presumes that, in the absence of substantial evidence to the contrary, a compensation claim falls within rather than outside its provisions. The record makes no substantial evidentiary disclosure that would support the proposition that the [second] infarction was incited by anything outside the employment.

Id. at 150 (footnote omitted).

This Court has also held that an injury need not be traceable to any particular work-related incident to be compensable. In *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966), we held that statutory presumption applicable to a mental breakdown apparently suffered as the cumulative result of the claimant's twenty years of service as a parking lot attendant. Similarly, it has been held that there is no requirement that the injury arise from any unusual work-related stress for the presumption to apply. *Mitchell v. Woodworth*, 449 F.2d 1097 (D.C. Cir. 1971); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (*en banc*).

The foregoing cases make clear the pervasive scope of the statutory presumption of compensability. Indeed, no decision of this Court has ever failed to apply the presump-

tion to any facet of any claim before it. We now hold expressly that where a claimant has been injured, the Act requires that, in the absence of substantial evidence to the contrary, a claimant be given the benefit of a rebuttable presumption that the injury arose out of and in the course of the claimant's employment.

V.

There is no question in this case that the claimant suffered an injury; therefore, he was entitled to the benefit of the statutory presumption that his claim was compensable. By focusing on the "accident" which allegedly occurred on November 19, 1975, and by requiring the claimant to prove that the accident did in fact occur, the ALJ denied the claimant the benefit of this presumption. The central finding, that no accident in fact occurred, is thus not responsive to the issue properly presented for resolution. The statutory presumption is not limited to the inference of a work-related incident from an injury, and neither is the scope of the employer's burden of coming forward with substantial evidence in rebuttal. Even if the asserted work-related incident had never occurred, the injuries suffered by the claimant might nevertheless have been "employment-bred." As a consequence, for purposes of this proceeding, petitioner was entitled to the presumption that they were.[8]

In a case of this sort, "[a]n administrative order must be set aside if it rests on factual premises not based on substantial record evidence or if the agency's underlying standards are not in accord with law." *Wheatley v. Adler*, 407 F.2d at 310. We are stymied in the application of this

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[8] During the oral arguments in this case, a question arose as to whether the statutory presumption of compensability applies not only to the fact of causality, but also to the fact of injury. Since there is no issue concerning the occurrence of an "injury" in this matter, we find it unnecessary to address this question.

standard from the start. Because the ALJ and the Benefits Review Board relied upon a statutory presumption narrower than that elaborated here, the agency did not make all of the findings necessary for a proper disposition of petitioner's claim. We cannot anticipate what these findings will be. *See Vendemia v. Cristaldi*, 221 F.2d 103, 106 (D.C. Cir. 1955).

We hereby vacate the decision of the Benefits Review Board and remand the case for a full reconsideration of petitioner's claim in light of this opinion.

So ordered.

APPENDIX D

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D.C. 20210

BRB No. 78-451

RALPH RILEY
Claimant-Petitioner

v.

U.S. INDUSTRIES/FEDERAL SHEET METAL

and

INSURANCE COMPANY OF NORTH AMERICA
Employer/Carrier-Respondents

Filed as Part of the Record February 27, 1979

DECISION

Appeal from the Decision and Order of William A. Gershuny, Administrative Law Judge, United States Department of Labor.

James F. Green (Ashcraft, Gerel & Koonz), Washington, D.C., for the claimant.

Richard W. Galiher, Jr. (Galiher, Clarke, Martell & Donnelly), Washington, D.C., for the employer/carrier.

Before: SMITH, Chairman, MILLER and KALARIS, Members.

KALARIS, Member:

This is an appeal by the claimant from the Decision and Order (78-DCWC-82) of Administrative Law Judge William A. Gershuny pursuant to the provisions of the Long-

shoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code § 501 *et seq.* (hereinafter, the Act).

Claimant has been a sheet metal worker for 32 years. In 1970 he was diagnosed as suffering from cervical arthritis. Claimant testified that on November 19, 1975, he was working on a scaffold with co-worker Howard Sutherland hoisting ductwork onto trapeze hangers and positioning it for proper alignment. Toward the end of his work shift, claimant stated that he was moving to a second, higher level of scaffolding when he struck the back of his neck on the lower duct line, knocking his hard hat off and causing him to fall back onto his knees. After the incident, claimant took some medication he had with him which he occasionally used to relieve pain from his cervical arthritis. However, claimant stated that the pain from his injury was much worse and involved the back of his head, his arms, and his chest. Mr. Sutherland drove claimant home and claimant retired early. At about 2:30 the following morning, claimant awoke with severe pains in his arms, neck, and chest. His wife drove him to the hospital where his condition was preliminarily diagnosed as a myocardial infarction. However, the final diagnosis was cervical osteoarthritis and hiatal hernia.

Claimant sought compensation under the Act for permanent total disability from November 20, 1975 and continuing. In the Decision and Order, the administrative law judge framed the issues to be determined as:

> (1) Whether Claimant sustained an injury, within the meaning of Sec. 2(2) of the Act, on November 19, 1975 as alleged;
>
> (2) Whether timely notice under Sec. 12 was given to Respondent; and
>
> (3) Claimant's average weekly wage.

The administrative law judge concluded that there occurred no injury within the meaning of Section 2(2) of the Act, 33 U.S.C. § 902(2), and accordingly did not consider the remaining issues.

Claimant appeals contending that the administrative law judge misconstrued the meaning of the term "injury", and failed to apply the presumption in Section 20 of the Act, 33 U.S.C. § 920, properly. Claimant also contends that the administrative law judge erroneously resolved factual doubts against claimant, and that the Decision is not supported by substantial evidence in the record considered as a whole.

The Board's standard of review requires that we affirm a decision if the facts found by the administrative law judge are supported by the record and the decision is in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith Associates*, 380 U.S. 359 (1965). Moreover, the inferences drawn by the administrative law judge must be accepted unless they are irrational or inconsistent with law. *See Cardillo v. Liberty Mutual Ins. Co.*, 33 U.S. 469 (1942). The Board may not reweigh the evidence and questions of credibility are for the administrative law judge. *South Chicago Coal and Dock Co. v. Bassett*, 104 F.2d 522 (7th Cir. 1939), *aff'd*, 309 U.S. 251 (1940); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

The law applied by the administrative law judge and the conclusion he reached was stated as follows:

> In evaluating evidence on the issue of "injury", it is clear that while the Section 20 presumption is inapplicable to the issue of the happening of an accident and while the burden rests with Claimant to prove an accident, *Murphy* v. *SCA/Shayne Bros.*, 7 BRBS 309 (1977), the evidence must nevertheless be construed in

> a light most favorable to Claimant and all doubts must be resolved in Claimant's favor.
>
> Applying these standards, I find that Claimant sustained no injury within the meaning of Sec. 2(2) of the Act on November 19, 1975, as alleged, and that Claimant and Sutherland gave false testimony as to the happening of an accident.

D & O at 5.

The administrative law judge sets forth his reasons for reaching this conclusion in detail in the Decision below. Briefly stated, the administrative law judge found the following facts significant: Claimant and Mr. Sutherland had been friends for 14 years and their testimony at the hearing regarding the way in which claimant's accident occurred was identical. However, prior to the time of the hearing, the accident was described as the result of lifting heavy duct work and not from a blow to the head. Claimant's son and wife, who could have corroborated his contemporaneous complaint of an accident, were not called to testify.[1] Claimant made no complaint of neck and shoulder pain upon admission to the hospital and did not mention an accident at work even though he gave a history which revealed two prior accidents. The first time an alleged accident at work was reported to employer was November 26, 1975. In addition, the administrative law judge found that the alleged accident was not reported to claimant's treating physicians until December 19, 1975.

From these facts, the administrative law judge inferred that the story of an accident was not constructed until claimant's release from the hospital on November 25, 1975, and that claimant's differing accounts of the accident, "[R]enders unbelievable his testimony as to the happen-

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[1] *See Hansen v. Oilfield Safety, Inc.*, 8 BRBS 835, 841, BRB Nos. 78-304 & 78-304/A (Sept. 29, 1978).

ing of any accident." Accordingly, the administrative law judge denied the claim.

After careful review, we conclude that the administrative law judge's summary and analysis of the evidence are both supported by the record and consistent with the applicable law. There can be no question that the inferences drawn by the administrative law judge, which led him to conclude that no accident occurred, are reasonable and that the administrative law judge's conclusion on this point must be affirmed.

Claimant's argument that the administrative law judge did not resolve doubts in claimant's favor is without merit. This rule does not require that the administrative law judge always find for claimant when there is a dispute or conflict in the testimony. *Lee v. Hechinger Co.*, 3 BRBS 288, BRB No. 75-195 (Feb. 27, 1976); *Stanley v. Maryland Shipbuilding and Dry Dock Co.*, 5 BRBS 101, BRB No. 76-205 (Oct. 5, 1976). It merely means that, if doubt about the proper resolution of conflicts remains in the administrative law judge's mind, these doubts should be resolved in claimant's favor. It is clear that the administrative law judge's conclusions in the present case were arrived at without doubts about what the administrative law judge felt to be the proper resolution of conflicts.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

/s/ Ismene M. Kalaris
Ismene M. Kalaris, Member

I Concur:

/s/ Samuel J. Smith
Samuel J. Smith, Chairman

Dated this 27th day of February, 1979.

MILLER, Member, dissenting:

I respectfully dissent from the majority's opinion in this case. The majority apparently affirms the administrative law judge on the theory that claimant has failed to prove that he sustained an accident at work. It is my opinion that both the administrative law judge and the majority have confused the meaning of the terms "accident" and "injury."

The Act does not require that claimant prove an accident in order to establish a claim. To the contrary, compensation is payable under the Act if claimant is disabled because of *injury* which is causally related to his employment, 33 U.S.C. §§ 902(10), 902(2).

If something goes wrong within the human frame, there has been an injury. *Wheatley v. Adler,* 407 F.2d 307 (D.C. Cir. 1968); *Southern Stevedoring Co. v. Henderson,* 175 F.2d 863 (5th Cir. 1949). In *Furlong v. O'Hearne,* 144 F. Supp. 266, 270, (D. Md.-1956), the court quoted the following as one of the best definitions of "injury":

> In common speech, the word 'injury' as applied to a personal injury to a human being, includes *whatever lesion or change in any part of the system produces harm or pain* or a lessened facility of the natural use of any bodily activity or capability." (Emphasis added).

Moreover, it is well settled that an aggravation of a preexisting condition is an injury within the meaning of the Act. *Wheatley v. Adler, supra.* Clearly, the facts in the instant case establish that claimant suffered an injury on November 20, 1975, when he awoke with pain in his chest and arms which was later diagnosed as the result of cervical osteoarthritis.

Therefore, the real issue in this case is not whether claimant sustained an accident at work but whether claim-

ant's injury is causally related to his employment. This issue must be determined in light of the presumption in Section 20(a) of the Act, 33 U.S.C. § 920(a), which "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. Kelly*, 554 F.2d 1075 (D.C. Cir. 1976). The presumption places the burden on employer to prove by substantial evidence that claimant's injury did not arise out of or in the course of employment. *Marra Bros. v. Cardillo*, 154 F.2d 357 (3d. Cir. 1946). *Kwasizur v. Cardillo*, 77 F. Supp. 107 (E.D.Pa. 1948).

Because the administrative law judge incorrectly focused his attention on whether claimant sustained an accident, the decision contains no findings or analysis of whether employer has presented evidence sufficient to rebut the Section 20 presumption. Instead, the administrative law judge found that claimant lied about the accident at work. However, the mere fact that claimant may have lied does not disentitle him to compensation for any disability he may have as a result of his employment. *Miller v. O'Hearne*, 181 F. Supp. 105 (D. Md. 1960); *Ennis v. O'Hearne*, 223 F.2d 755 (4th Cir. 1955). Moreover, contrary to the majority's conclusion in this case, the Board has held that a claimant's lack of candor is not substantial evidence to support a denial of a claim. *Alley v. Garfinkel Co.*, 1 BRBS 66, BRB No. 74-111 (Aug. 6, 1974); *See also Roberson v. Bethlehem Steel Corp.*, 8 BRBS 775, BRB No. 77-109 (Sept. 11, 1978) (Miller, Member, dissenting).

I therefore conclude this case should be reversed and remanded for a determination of whether employer has rebutted the Section 20 presumption.

/s/ JULIUS MILLER
Julius Miller, Member

APPENDIX E

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 78-DCWC-82
OWCP No. 100376

In the Matter of

RALPH RILEY
Claimant

against

U.S. INDUSTRIES/FEDERAL SHEET METAL
Employer

and

INSURANCE COMPANY OF NORTH AMERICA
Carrier

James F. Green, Esquire
2101 "L" Street, N.W.
Washington, D.C. 20037
For the Claimant

Richard W. Galiher, Jr., Esquire
1215 19th Street, N.W.
Washington, D.C. 20036
For the Respondents

Before: WILLIAM A. GERSHUNY
Administrative Law Judge

DECISION AND ORDER

Claimant, a sheetmetal worker, seeks permanent total disability benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, as ex-

tended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code 501 *et seq.*, based on a disabling neck injury allegedly sustained on November 19, 1975, at a construction site in the District of Columbia.

A hearing was conducted on March 20 and 24, 1978 and additional medical evidence was submitted through post-hearing depositions of Drs. Sanchez and Wisotsky, both of which are admitted in evidence.

The principal issues presented are—

(1) Whether Claimant sustained an injury, within the meaning of Sec. 2(2) of the Act, on November 19, 1975 as alleged;

(2) Whether timely notice under Sec. 12 was given to Respondent; and

(3) Claimant's average weekly wage.

Because I conclude that no injury, in fact, occurred, the remaining issues are not considered.

In his Pre-Hearing Statement of December 5, 1977, and opening statement at the hearing, Claimant stated his claim to be based on a November 19, 1975 accident in which he felt a sharp neck pain while lifting duct work weighing approximately 500 lbs.

The alleged accident was testified to in different terms, however, by Claimant and Howard Sutherland, a co-worker, close personal friend for 14 years and the sole witness. Their testimony as to the happening of the accident was identical: Claimant, while raising himself from one level of a scaffold to a higher one struck the back of his neck and shoulders on duct work which previously had been installed on hangers suspended from the ceiling. At the time, Claimant was about to make final duct alignment adjustments. Because the alleged incident occurred near the end of the shift, most of the other workers already

were gone and Claimant and Sutherland left without reporting it to any management personnel at the job-site.

Claimant testified that, upon arriving home, he informed his wife that he had "hit my head on the duct". Presumably, his son was also informed, since Claimant testified that the son was required to pick up his father's truck which was left at Sutherland's home because Claimant was unable to drive. Despite the fact that each could have corroborated Claimant's contemporaneous complaint of an accident, neither was called to testify.

In the early hours of the following morning, Claimant awoke with severe chest pains and was admitted to the hospital with a preleminary diagnosis of a myocardial infarction. Hospital records on admission at 6:25 a.m. indicate complaints of tightness in arms and chest, blurry vision and inability to walk; a history of a similar episode one year earlier and a cholestoral problem; and a finding on physical examination of "neck-supple, nontender."

At 7:30 a.m. a more comprehensive history was taken and again no complaints of neck or shoulder pain were made and, despite a history given of other prior injuries and cervical arthritis, no history of an accident on the previous day was given to the attending physician.

Although the failure of Claimant or his wife to give a history of the accident which allegedly occurred less than 17 hours earlier is perhaps understandable during the excitement of an admission for a suspected heart attack, the absence of complaints of neck and shoulder pain is significant, in view of Claimant's testimony as to the severity of the pain produced by the accident.

Hospital records indicate that a heart attack later was ruled out, and a final diagnosis made of cervical osteoarthritis and hiatal hernia (which produces symptoms similar to those of a myocardial infarction).

Particularly significant is the history given by Claimant to Dr. Sanchez, a consulting orthopedist, on November 23, 1975, the fourth day of hospitalization. It includes the origins and treatment of the cervical arthritic condition, a description of Claimant's work and the circumstances of a work-connected injury in 1969 and a service-connected injury many years earlier. Despite Claimant's testimony that he told Dr. Sanchez at that time about the November 19, 1975 accident, the medical record of November 23, 1975 is silent. Furthermore, Dr. Sanchez testified on deposition that he saw Claimant in the hospital on more than one occasion, but no mention was made of an incident on November 19, 1975.

On December 19, 1975, during an office visit, Claimant gave a history to Dr. Sanchez of experiencing "pain at the base of the neck" in November 1975, while "moving the duct work into position," adding that, with the excitement of the hospital admission, "he forgot to mention to the attending physicians [including Dr. Sanchez] this incident that happened at work."

Dr. Wisotsky, who saw Claimant on December 5, 1975, after his release from the hospital, and again on December 12, 1975 and January 2, 1976, has no record of a history of an injury at work, although he recalls that, at some time between 1975 and 1977, Claimant told him he was struck on the back of the neck. Nor was a history of an injury at work given by Claimant to Dr. Scalettar, who examined Claimant on December 9, 1975, or to Dr. Maguigad, who examined Claimant on December 15, 1975.

The story of the November 19, 1975 "accident" first surfaced, however, on November 26, 1975, the day on which I find Sutherland first returned to work following Claimant's hospitalization. He testified that he told a number of coworkers, including foreman Fury, that Claimant "had struck his neck and shoulder on the duct." Fury, a fellow member of

Claimant's local union and no longer employed by Respondent, testified only that Sutherland stated Claimant was "hurt on the job".

Not only is it significant that the happening of the "accident" first was reported to the Employer seven days after it allegedly occurred and to Claimant's treating physicians not earlier than 30 days after, it is equally important in an evaluation of the evidence to trace Claimant's differing versions of the accident.

As stated above, the testimony of Claimant and Sutherland at the hearing described an accident in which Claimant struck his neck and shoulder on an already positioned duct, while raising himself from one level of the scaffold to another. Yet, remarkably, this was the first time that the accident was described in terms of a bump or blow to the body while climbing a scaffold. Prior to the time of hearing the accident was described as involving the lifting of heavy ductwork, as is reflected by the following portions of the record:

December 19, 1975 examination by Dr. Sanchez (report dated January 26, 1976): "moving duct work into position, when he felt pain at the base of the neck."

December 29, 1975 compensation claim signed by Claimant's counsel: "lifting duct work weighing approximately 500 pounds and felt sharp pain in neck."

Form LS-203, "Employee's Claim For Compensation" signed by Claimant's counsel (Respondent's Exhibit "E"): "Lifting duct work with co-worker, weighing approximately 500 pounds, felt sharp pain in neck and sat down.

July 16, 1976 compensation claim signed by Claimant: "lifting sheet metal duct work with shoulders into

trapese hangars striking neck and shoulders on duct work."

July 25, 1977 report of Dr. Sidhu (Exhibit No. 2, Sanchez deposition): "doing sheetmetal duct work . . . struck neck and shoulder on the steel duct."

Form LS-18, "Pre-Hearing Statement" signed by Claimant's counsel on December 5, 1977: "Lifting duct work with co-worker weighing approximately 500 lbs., felt sharp pain in neck."

Claimant attempted to rationalize his varied accounts of the accident—from "pain while lifting duct", to "struck neck and shoulders while lifting duct", to "struck neck and shoulders on duct while climbing scaffold"—by testifying:

> It was a general type of work we were doing at the time, exactly what I told on that report of the doctor's. It was a generalization of what I was doing when it hit, when I hit my neck (Tr. 98).

In evaluating evidence on the issue of "injury", it is clear that while the Section 20 presumption is inapplicable to the issue of the happening of an accident and while the burden rests with Claimant to prove an accident, *Murphy* v. *SCA/Shayne Bros.*, 7 BRBS 309 (1977), the evidence must nevertheless be construed in a light most favorable to Claimant and all doubts must be resolved in Claimant's favor.

Applying these standards, I find that Claimant sustained no injury within the meaning of Sec. 2(2) of the Act on November 19, 1975, as alleged, and that Claimant and Sutherland gave false testimony as to the happening of an accident.

The record, in my judgment, is free of doubt and permits no other findings as to the credibility of Claimant and Sutherland. Neither Claimant nor Sutherland reported the

accident before leaving the job site, despite the fact that some of the workers had not yet left for the day and the Employer maintained an office in a trailer on the construction site. On admission to the hospital, Claimant (who was conscious and alert) made no complaint of neck and shoulder pain. Neither he nor his wife gave a history of an accident on November 19, 1975, at any time during his five day period of hospitalization, despite extensive treatment by a consulting orthopedist of Claimant's long standing cervical arthritic condition. It was not until several weeks later that Claimant first made mention of a recent accident to Dr. Sanchez, even though he had previously revealed two much earlier accidents. It is simply beyond belief that a recent severe accident would not have been foremost in his mind and disclosed, particularly while receiving treatment in the hospital for the same condition allegedly affected by the "accident".

It was not until his release from the hospital on November 25 that "an injury" first was reported to a representative of the Employer, foreman Fury. I find that this occurred on November 26, 1975, the first day Southerland worked following the alleged accident. Time and attendance records so indicate and Claimant's failure to give a history of the accident while in the hospital indicates that the story of an accident was not constructed until Claimant's release on the 25th.

Claimant's differing accounts of the accident likewise compel these credibility findings. Claimant's explanation that the initial version, "neck pain while lifting heavy duct work," was intended to represent a general statement of the work being performed that day, rather than a description of the "struck neck while climbing scaffold" accident is itself incredible. Had a scaffolding accident been related by Claimant to his counsel, an experienced compensation attorney, in December 1975, he would no more have described a lifting accident than he would have used

the language "while driving a bus" to describe a slip and fall accident on icy bus stairs. One can only speculate why Claimant, at the hearing, (apparently to the surprise of counsel; see LS-18, filed December 5, 1977) gave an entirely different version of the accident, particularly since each version, if true, would appear sufficient to support the claim. Nevertheless, the fact that Claimant gave several significantly different accounts, when considered with other evidence, renders unbelievable his testimony as to the happening of any accident.

Finally, as indicated earlier, Sutherland's testimony that he informed foreman Fury and others in November 1975, that Claimant "had struck his neck and shoulder on the duct" is not credited, as it conflicts significantly with Claimant's own contemporaneous account of a "pain while lifting" accident. In this respect, I credit Fury's testimony that Sutherland reported only that Claimant had been "hurt on the job."

The claim is denied.

ORDER

It Is Hereby Ordered that the claim for compensation be, and the same hereby is, denied.

/s/ William A. Gershuny
William A. Gershuny
Administrative Law Judge

Dated: June 22, 1978
Washington, D.C.

WAG:jps